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TAN WEI MA & ORS v. PENTADBIR TANAH DAERAH GOMBAK

HIGH COURT MALAYA, SHAH ALAM
MOHAMED ZAINI MAZLAN JC
[LAND REFERENCE NO: 15-79-2009]
B 20 APRIL 2015

LAND LAW: *Acquisition of land – Compensation – Adequacy of – Objection against compensation awarded – Application for – Whether application should be heard and decided by judge sitting alone under provisions of Land Acquisition Act 1960 – Whether applicants bypassed decision making process of land reference court comprising of judge and two assessors – Whether necessary for assessors to consider and provide opinion on various heads of compensation – Whether issues should be addressed and decided after full trial consisting of judge and two assessors – Land Acquisition Act 1960, ss. 40A(1), 40C, 40D(1)*

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Part of the applicants' land was acquired for the 'Tapak Projek Skim Bekalan dan Pengagihan Air Langat II-Fasa 1' ('the project') under the Land Acquisition Act 1960 ('LAA 1960'). The respondent awarded the applicants a sum of RM444,000 as compensation. Dissatisfied, the applicants filed their objections premised on the following grounds (i) that the amount of
E compensation was not satisfactory; (ii) no award was given for injurious affection for the non-acquired part of the land; (iii) costs should be awarded for reclamation, land filling earthworks, and for building the retaining wall; and (iv) that the acquired land was for commercial usage, and that the award was not reflective of its market value. The applicant sought leave to address
F this court, consisting of a judge sitting alone, pursuant to s. 40A of the LAA 1960, for a ruling on issues set out in their application. The issues that arose for determination were (i) whether the applicants' application should be heard and decided by a judge sitting alone under the provisions of the LAA 1960; (ii) whether the applicants, based on the applicants' valuer's report and
G additional rebuttal report, had proved a *prima facie* case, to show that the award awarded by the Land Administrator was inadequate and had proved a *prima facie* case for an injurious affection claim; and (iii) whether the respondent's valuer's report and the rebuttal report filed on 19 March 2014 should be disregarded, because the respondent had failed to support their statements in their reports with evidence.

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Held (dismissing applicants' application):

(1) Section 40A(1) of the LAA 1960 stipulates that in a matter pertaining to the amount of compensation, the court shall consist of two assessors, who shall assist the judge in determining a fair and reasonable amount
I of compensation. A High Court Judge is not an expert in determining the value of a land, as valuation of land is not a mathematical process, hence the requirement set out under s. 40A(1) of the LAA 1960. (para 21)

(2) The applicants, in seeking for a determination on whether they have established a *prima facie* case, was in essence seeking to bypass a decision making process of a land reference court comprising of a judge and two assessors. Should it be ruled in the applicants' favour, it would essentially cement the applicants' claim that the award was inadequate. This was contrary to the provisions of s. 40D(1) of the LAA 1960. (para 22)

(3) The applicants was seeking for a *prima facie* ruling, that the award was inadequate, that they had proven a *prima facie* case for injurious affection and that the respondent had failed to support their valuer's report and evidence. These were not entirely legal issues. These issues, once determined, would lead to a finding as to whether the compensation awarded was sufficient. It was necessary for the assessors to consider and provide their opinion on the various heads of compensation claimed by the applicants as provided under s. 40C of the LAA 1960. (para 24)

(4) The opinion of the assessors were necessary for this court to make a finding on the issues mentioned, for the evidence that would be in the realm of the assessors' expertise would need to be considered. The valuers' report submitted by both parties would contain matters such as the market value on a comparative basis, injurious affection, to name a few. These were matters that would require this court, with the aid of two assessors, to come to a finding. This is expressly provided for under para. 2 of the First Schedule of the LAA 1960, where several matters that should be taken into consideration are set out, such as market value, injurious affection and so on. (para 25)

(5) Furthermore, para. 2(1) of the Third Schedule to the LAA 1960 stipulates that an applicant's valuer's report must establish a *prima facie* case. That, however, is only the first stage, as para. 2(2) of the same schedule states that any oral evidence by the applicant's valuer can further be adduced by way of cross-examination or re-examination. It would as such be crucial for the trial to be concluded first before this court comprising of a judge together with two assessors, who will then be able to make a finding, whether the applicants have firstly established a *prima facie* case, and secondly, whether the respondent's valuer's reports have sufficiently rebutted the applicants' valuer's reports. This is the procedure set out under para. 2 of the Third Schedule to the LAA 1960. Furthermore, there may be further evidence adduced, should the applicants' valuer, as well as the respondent's valuer, be subjected to cross-examination and re-examination; para. 2(2) Third Schedule to the LAA 1960. (para 26)

(6) Hence, the determination as to whether the applicants had proved a *prima facie* case, or whether the respondents had substantiated their statements in their valuer's report and rebuttal report with evidence, should be addressed and decided after a full trial consisting of a judge and two assessors. (para 31)

Case(s) referred to:

Jitender Singh Pagar Singh & Ors v. Kerajaan Malaysia [2010] 8 CLJ 1001 HC ***(refd)***

Jitender Singh Pagar Singh & Ors v. Pentadbir Tanah Wilayah Persekutuan & Another Appeal [2012] 2 CLJ 165 CA ***(refd)***

Loh Ah Hoi & Anor v. Pemungut Hasil Tanah, Kedah [1996] 2 BLJ 27 HC ***(refd)***

Malakoff Bhd & Anor v. Pentadbir Tanah, Kedah [2004] 1 CLJ 189 FC ***(refd)***

Sebekai Plantation Berhad v. The Superintendent, Lands and Surveys (No 2) [2012] 1 LNS 320 HC ***(refd)***

Superintendent of Lands and Surveys Department Sibu Division & Anor And Another Appeal v. Usang Labit & Ors [2014] 9 CLJ 370 CA ***(refd)***

Legislation referred to:

Land Acquisition Act 1960, ss. 40(1), 40A(1), 40C, 40D(1)

For the applicants - Raymond Mah Mun Kitt (Mak Ka Wai with him); M/s Mah Weng Kwai & Assocs

For the respondents - Etty Eliany Tesno; State Legal Advisor's Office, Selangor

Reported by Suhainah Wahiduddin

JUDGMENT

Mohamed Zaini Mazlan JC:

Introduction

[1] Part of the applicants' land were acquired for the "Tapak Projek Skim Bekalan Dan Pengagihan Air Langat II – Fasa 1 (Cadangan Jajaran Paip Air Corridor Utara) Mukim Hulu Kelang, Daerah Gombak, Negeri Selangor" under the Land Acquisition Act 1960 ("LAA 1960"). Not satisfied with the compensation awarded, the applicants took steps to submit their objections.

[2] The applicants have filed several interlocutory applications that have since been heard and decided. With this latest application, the applicant is seeking leave to address this court, consisting of a judge sitting alone pursuant to s. 40A LAA 1960, for a ruling on issues set out in their application.

[3] The pertinent issue is whether the issues in the applicants' application, should be heard and decided by a judge sitting alone under the provisions of the LAA 1960.

Background Facts

[4] A declaration to acquire the land under the LAA 1960 was made on 20 December 2007. The respondent awarded the applicants a sum of RM444,000 as compensation. The applicants being dissatisfied with the award, filed their objection on 6 January 2009. The applicants' objections were premised on the following grounds:

(a) That the amount of compensation was not satisfactory, and did not reflect the market value,

(b) No award was given for injurious affection for the non-acquired part of the land, A

(c) Costs should be awarded for reclamation, land filling earthworks, and for building the retaining wall, and

(d) That the acquired land was for commercial usage, and that the award was not reflective of its market value. This particular ground was a question of law. B

[5] The chronology of events that followed are as follows:

26 November 2010	The acquired land was held to be an agricultural land with commercial potential. C
8 April 2011	Based on the earlier decision of the 26 November 2011, the valuer's reports and submission of parties, the market value of the land was increased to RM484 per square meter, and an increase of RM272,320 was awarded to the applicants. No award was given for injurious affection. D

The hearings were presided by Zainal Azman bin Abd Aziz J.

26 November 2010	The applicants appealed to the Court of Appeal in respect of the decision delivered on 26 November 2010, pertaining to the category of land use, and the decision of the 8 April 2011, which was in respect of injurious affection. E
24 June 2013	The Court of Appeal allowed the applicants' appeal, and ordered for this Land Reference to be heard before another High Court Judge and a new panel of assessors. F
19 December 2013	The applicants filed an application in the High Court, to add the following issues to their grounds of objection: G (a) A claim for injurious affection for the non-acquired part of the land, (b) A claim for injurious affection for the adjoining land that also belonged to them, and H (c) That the valuation of the acquired land and the claim for injurious affection, be based on the category of building land, following the Court of Appeal's decision. I
6 February 2014	The applicants' application was allowed.

21 March 2014	The applicants filed another application for the court to decide on the following issue of law: Whether the respondent is required to support the statements and conclusions in its valuer's report and rebuttal report with evidence, and if so, the consequences in law of the failure to do so.
3 April 2014	The question of law posed by the applicants was answered in the affirmative, where it was held that any statement of conclusion that is not supported by evidence, should be accorded little, or no weight, in the assessment of compensation.

These two applications by the applicants were heard and decided by Vernon Ong J (now JCA).

[6] The Land Reference was scheduled for hearing on 30 October 2014. However, the applicants had on 1 October 2014, filed this application ("the applicants' application"), where it sought for a ruling on the following:

(a) Whether the applicants, based on the applicants' valuer's report filed on 19 March 2014, and the applicants' additional rebuttal report filed on 10 September 2014, have proven a *prima facie* case, to show that the award awarded by the Land Administrator was inadequate,

("the first issue")

(b) Whether the applicants, based on the applicants' valuer's report filed on 19 March 2014 and the applicants' additional rebuttal report filed on 10 September 2014, have proven a *prima facie* case for injurious affection claim,

("the second issue")

(c) Whether the respondent's valuer's report filed on 4 March 2014, and the rebuttal report filed on 19 March 2014, should be disregarded, because the respondent failed to support their statements in their reports with evidence, and

("the third issue")

(d) A direction be given that the respondent shall not file any valuer's report or rebuttal reports, for the purpose of the hearing of this Land Reference fixed on 30 October 2014.

("the fourth issue")

The Applicants' Case

The First Issue

[7] The first issue that the applicants have sought for a ruling, is whether they have proven a *prima facie* case to show that the award awarded by the Land Administrator was inadequate, based on the applicants' valuer's report and additional rebuttal report.

[8] The applicants' submit that they had pursuant to the Court of Appeal's ruling that the acquired land be categorised as building land, provided suitable comparable sales to establish the true market value of the acquired land. They also contend that their valuer's reports, have supported each and every single claim made in the report with evidence.

[9] The applicants relied on the case of *Sebekai Plantation Berhad v. The Superintendent, Lands and Surveys (No 2)* [2012] 1 LNS 320 (Land Reference No 15-05-2008 (BTU)), where the court held that a party claiming for an enhanced compensation must produce evidence to support its claim that the award is inadequate, and if the party concerned succeeds in showing *prima facie* that the award is inadequate, the acquiring party must then support the award by producing evidence.

[10] The applicants also referred to the case of *Loh Ah Hoi & Anor v. Pemungut Hasil Tanah, Kedah* [1996] 2 BLJ 27; [1996] MLJU 50 (HC), where Mohd Hishammuddin J (now JCA), held that the court was under a duty to evaluate the applicants' valuation report and the evidence produced, and that the court will accept the valuation of the former's valuer, if it had succeeded in establishing a *prima facie* case.

The Second Issue

[11] The second issue is quite similar to the first issue, in that the applicants are also seeking for a ruling that their valuer's report and additional rebuttal report have proven a *prima facie* case, in respect of their claim for injurious affection. The claim for injurious affection is in respect of the reduction of the area that could be developed, and the higher costs to develop the non-acquired part of the land, which is a hilly area.

[12] The applicants sought to rely on the ruling made by Vernon Ong J on 3 April 2014, where the learned judge in allowing the applicants' application, held that any statement of conclusion that is not supported by any evidence, shall be accorded little, or no weight in the assessment of compensation.

[13] The applicants submit that Justice Vernon's Ong's ruling meant that the learned Judge took the view that the applicants have proven a *prima facie* case for injurious affection, and that it is now incumbent on the respondent to provide sufficient evidence to rebut the applicants' claim.

[14] The applicants went on to conclude that the respondent's valuer has failed to provide satisfactory evidence to rebut the applicants' claim for injurious affection.

[15] The applicants referred to the case of *Superintendent of Lands and Surveys Department Sibu Division & Anor And Another Appeal v. Usang Labit & Ors* [2014] 9 CLJ 370. The Court of Appeal had in that case, held that the burden of adducing evidence to rebut shifts to the other party, once the plaintiff succeeds in adducing some evidence that is not incredible.

[16] The applicants also relied on the Federal Court's decision in the case of *Malakoff Bhd & Anor v. Pentadbir Tanah, Kedah* [2004] 1 CLJ 189, where the apex court held that the respondent's failure to challenge the appellant's claim for injurious affection was fatal.

The Third Issue

[17] As for the third issue, the applicants also relied on Justice Vernon Ong's 3 April 2014 ruling, and contend that the respondent's valuer's report and rebuttal report should be totally disregarded, as the reports are not supported by evidence.

The Fourth Issue

[18] The final issue for determination is whether the respondent should be barred from filing any further valuer's or rebuttal reports before the hearing of the Land Reference. The applicants take the view that any further reports filed will serve to delay the hearing.

[19] There would be no necessity to make a ruling on the fourth issue, as the respondent's counsel had at the hearing of this application, stated that the respondents will not be filing any further valuation report. It has as such ceased to become a moot point.

Findings

[20] The first, second and third issues can be addressed simultaneously, as the applicants are in essence seeking for this court, with a judge sitting alone under s. 40A LAA 1960, to make a determination, or a finding, on the issues that they have set out.

[21] The first question that arises is whether this application should be heard and decided by a court consisting of a judge sitting alone, or by the court consisting of a judge and two assessors. Section 40A(1) LAA 1960 stipulates that in a matter pertaining to the amount of compensation, the court shall consist of two assessors, who shall assist the judge in determining a fair and reasonable amount of compensation. A High Court Judge is not an expert in determining the value of a land, as valuation of land is not a mathematical process, hence the requirement set out under s. 40A(1) LAA 1960; *Jitender Singh Pagar Singh & Ors v. Pentadbir Tanah Wilayah Persekutuan & Another Appeal* [2012] 2 CLJ 165.

[22] The applicants, in seeking for a determination on whether they have established a *prima facie* case, to show that the Land Administrator's award was inadequate (the first issue), and whether they have also proven a *prima facie* case for their injurious affection claim (second issue), and for a ruling to disregard the respondent's valuer's reports (third issue), is in essence, seeking to bypass the decision making process of a Land Reference court comprising of a judge and two assessors. Should I rule in the applicants' favour, it will essentially cement the applicants' claim that the award was inadequate. This will be contrary to the provisions of s. 40D(1) LAA 1960, which states as follow:

> In a case before the Court as to the amount of compensation or as to the amount of any of its items the amount of compensation to be awarded shall be the amount decided upon by the two assessors.

[23] The applicants contend that issues of fact and the heads of claim for an assessment of compensation, are to be decided by the court consisting of a judge sitting alone, and cited the case of *Le Hazen* (*supra*) in support. In *Le Hazen*, the learned Judicial Commissioner addressed what she deemed as two legal issues, firstly, the size of the land that was acquired, and secondly, whether the there was an implied condition that the acquired land was to be used for building or agricultural purposes.

[24] With respect, the issues that the applicants have posed here are distinct. The applicants in the first issue is seeking for a *prima facie* ruling, that the award was inadequate, and in the second issue that they have proven a *prima facie* case for injurious affection. These are not entirely legal issues. The same applies for the third issue in seeking for a ruling that the respondent have failed to support their valuer's report with evidence. These issues once determined, will lead to a finding as to whether the compensation awarded was sufficient. It will be necessary for the assessors to consider and provide their opinion on the various heads of compensation claimed by the applicants as provided under s. 40C LAA 1960.

[25] The opinion of the assessors are necessary for this court to make a finding on these three issues, for the evidence that would be in the realm of the assessors' expertise will need to be considered. The valuers' report submitted by both parties would contain matters such as the market value on a comparative basis, injurious affection, to name a few. These are matters that would require this court, with the aid of two assessors to come to a finding. This is expressly provided for under para. 2 of the First Schedule of the LAA 1960, where several matters that should be taken into consideration are set out, such as market value, injurious affection and so on.

[26] Furthermore, para. 2(1) of the Third Schedule to the LAA 1960, stipulates that an applicant's valuer's report must establish a *prima facie* case. That however, is only the first stage, as para. 2(2) of the same schedule states that any oral evidence by the applicant's valuer can further be adduced by

way of cross-examination or re-examination. It would as such be crucial for the trial to be concluded first before this court comprising, of a judge together with two assessors, who will then be able to make a finding, whether the applicants have firstly established a *prima facie* case, and secondly, whether the respondent's valuer's reports have sufficiently rebutted the applicants' valuer's reports. This is the procedure set out under para. 2 of the Third Schedule LAA 1960. Furthermore, there may be further evidence adduced, should the applicants' valuer, as well as the respondent's valuer, be subjected to cross-examination and re-examination; para. 2(2) Third Schedule LAA 1960.

[27] The applicants also seeks to rely on Justice Vernon Ong's ruling in their earlier application, where they had sought for a ruling on "Whether the respondent is required to support the statements and conclusions in its valuer's report and rebuttal report with evidence, and if so, the consequences in law of the failure to do so". Justice Vernon Ong in ruling that a statement of conclusion that is not supported by evidence, should be accorded little, or no weight in the assessment of compensation, had in my opinion, stated the obvious. It is of course necessary for the respondent to support their report with evidence, and that a failure on their part would be to their detriment. I disagree with the applicants' counsel's submission that Justice Vernon Ong had made a finding that the applicants have proven a *prima facie* case. His Lordship's ruling does not support that proposition.

[28] The applicants had also sought to rely on the case of *Loh Ah Hoi* (*supra*), where it was held that the court was under a duty to examine the applicant's valuation report and the evidence of their valuer. The applicants however, omitted to highlight the fact that the learned judge had only made a finding that the applicants had failed to establish a *prima facie* case after the valuer had been subjected to cross-examination. More notably, the learned judge had in that case sat alone, as the provisions for a judge to be assisted by two assessors under s. 40A LAA 1960, had only been included under the Land Acquisition (Amendment) Act 1997 (Act A575), which came into effect from 1 February 1998.

[29] The question of whether the applicants have substantiated the amount that they are claiming for injurious affection is an issue of compensation, and can only rightly be decided by this court comprising of two assessors.

Conclusion

[30] At the High Court level for the case of *Jitender Singh Pagar Singh & Ors v. Kerajaan Malaysia* [2010] 8 CLJ 1001 (HC), Aziah Ali J (now JCA), held as follows:

> The law accords the judge with two experts whose sole role is to decide the amount of compensation after having considered the documentary evidence including the valuation reports of both parties and the

> submissions made. The duty of the two assessors is therefore limited to that extent. The law does not contemplate that the judge is merely to preside without listening to the evidence hence becoming to what counsel for the plaintiffs terms as merely 'a rubber stamp'. There is no abdication of duty by the judge as **he is obliged to hear the evidence and submissions together with the two assessors**. (emphasis added) (p. 1011).

The Court of Appeal affirmed the High Court's decision, and held that the determination of the market value of the land acquired, and the amount of compensation to be awarded, is to be based on the opinion of the experts, namely the valuers.

[31] The determination as to whether the applicants have proven a *prima facie* case, or whether the respondents have substantiated their the statements in their valuer's report and rebuttal report with evidence, should be addressed and decided after a full trial consisting of a judge and two assessors.

[32] The applicants' application is dismissed with costs of RM2,000.